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In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

PGA TOUR, INC.,
Petitioner,

v.

CASEY MARTIN,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF KENNETH R. GREEN, II IN SUPPORT OF PETITIONER

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Dated: October 30, 2000

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INTEREST OF *AMICUS CURIAE*

Kenneth R. Green, II[1] ("Kenny"), is a freshman at Mississippi State University who has a great interest in golf. Kenny was the 1998 Middle Tennessee High School district and regional golf champion while a student at Clarksville High School in Clarksville, Tennessee. Kenny expects to play golf on the college level and to eventually play the PGA Tour. Kenny's major at Mississippi State University is Professional Golf Management. Kenny is an honor student. In 1999, Kenny was given the "Spirit of Golf Award" by the Tennessee Junior Golf Tour. Kenneth R. Green, II is listed in *Who's Who of American High School Students, Who's Who of America's High School Athletes* and was the 2000 Most Valuable Golfer for the Clarksville Leaf-Chronicle Newspaper's All-Region Golf Team.[2]

Kenny had complications at birth and eventually, (as a small child), had his left leg amputated from slightly above the ankle. *The Memphis Commercial Appeal*, (Newspaper) "Sports" page D-1 (August 11, 1999). Kenny wears a prosthetic leg for both everyday activities as well as sports.[3] Pursuant to rules and

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[1] Pursuant to Sup. Ct. Rule 37.6, Kenny asserts that neither Petitioner nor Respondent or their agents assisted Kenny or Kenny's counsel, in any way (even with expenses), in preparing this brief. *Pro bono* counsel was admitted to the bar of this Honorable Court on September 18, 1992. Consent to file this brief was given by both Petitioner and Respondent.

[2] Kenny was also picked "Best Personality" of his senior class at Clarksville High School (Class of 2000) and was active in his church youth group at First Church of the Nazarene in Clarksville, Tennessee.

[3] Kenny played junior varsity basketball at Clarksville High School.

custom, Kenny walks the golf course when playing in local, regional and national golf tournaments. Kenny also usually walks the course while playing golf simply "for fun".

In mid-June, 1999, Kenny and his father attended the Tennessee Bar Association Annual Convention in Pinehurst, North Carolina at the world famous golf resort there as a guest of current *pro bono* counsel who was a "CLE" speaker for said annual convention.[4] The week after the TBA Convention ended, the "U.S. Open" professional golf tournament was held at the same resort at Pinehurst, North Carolina. While walking the course where the U.S. Open would be played, Kenny talked about the Casey Martin case, (which was argued at the Ninth Circuit about a month prior to the TBA Convention). Kenny indicated that if said matter ever came before this Honorable Court, that Kenny wanted to "have a say" because of the close similarity of the two golfers' situations, but the stark contrast in their views related to modifying current PGA tournament rules. Pursuant to that conversation, and counsel's promise to Kenny, this *amicus* brief is being presented.

SUMMARY OF THE ARGUMENT

From the perspective of a golfer that has considerable skill and talent in the area of golf and also

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[4] *Pro bono* counsel is the Associate General Counsel for the Tennessee Bar Association ("TBA") and Kenny Green's Sunday school teacher. *Pro Bono* counsel does not play golf. This brief does not necessarily reflect the views of the Tennessee Bar Association, but only reflects the personal views of Kenneth R. Green, II.

from the perspective of a handicapped person that plays tournament golf; the whole nature of professional golf tournaments will be fundamentally altered if the decision of the Ninth Circuit in *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000) is upheld. The more rational logic is the view set forth by the Seventh Circuit in *Olinger v. U.S. Golf A'ssn*, 205 F.3d 1001 (7th Cir. 2000). The decision of the Ninth Circuit should be reversed as golf carts fundamentally alter the nature of professional golf competition in violation of 42 U.S.C. sec. 12182(b)(2)(A)(ii). While Petitioner may someday modify its rules; until all professional golfers at PGA Tour events can ride in golf carts if they so choose; no single professional golfer should be allowed that substantial advantage in PGA Tour tournaments. Neither this Honorable Court, nor lower courts, should mandate the rules of professional golf.

ARGUMENT

An old Native American saying declares "Never judge a man until you walk a mile in his moccasins". In the case at hand and the *Olinger* case, professional golfers testified about how the "fatigue factor" applies to a golf tournament. *See e.g., Olinger*, 205 F.3d at 1006 discussing Ken Venturi and *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1250 (D. Or. 1998). The only truly applicable comparison would be that of Ben Hogan after his 1949 automobile accident. *See, Olinger*, 205 F.3d at 1007. While fatigue is clearly a major factor, even to the able bodied tournament golfer, *See, Olinger*, 205 F.3d at 1006 discussing Ken Venturi; the true focus is whether or not mandated cart modifications for a single competitor fundamentally

alters this professional sport. 42 U.S.C. sec. 12181(b)(2)(A)(ii). In *Martin*, the Ninth Circuit said, "No", *Martin*, 204 F.2d at 1002 fn. 9; but specifically noted that ruling conflicted with the findings in *Olinger*. The true test should be how fatigue affects golfers that are handicapped. To consider this, the focus must be on golfers that are physically disabled that play competitive golf tournaments. Kenneth R. Green, II can be a valid comparison.

In tort law, the theory of the "eggshell plaintiff" exists. *See e.g., Doty v. Sewall*, 908 F.2d 1053, 1059 (1st Cir. 1990). Basically, the theory of the eggshell plaintiff states that a tortfeasor or criminal takes his victim as he finds him. *U.S. v. Feola*, 420 U.S. 671, 685 (1975). This includes physical or mental defects or physical/mental extra-ordinary abilities. *Doty*, 908 F.2d at 1059. This same logic applies to the field of professional sporting contests. The blatant difference between a "weekend hacker" and a professional is that the professional has thousands, and occasionally, millions, of dollars riding on their skill. As a matter of fact, according to the professional golfers' internet website "PGA Tour.com", Respondent has earned over $100,000.oo in the year 2000 playing golf. If a "Mulligan" is not allowed in a professional tournament because a single golf shot can determine hundreds of thousands of dollars between first and second place purses; surely a golf cart is also an unfair advantage when one reaches the professional golfer skill level.

The very nature of the professional level at any sport demands that the competitors prove themselves to be far and away superior in talent to the average player. *Accord*, *Martin*, 994 F. Supp. at 1248 fn. 9. Each person who reaches that level has overcome

some sort of hindrance; be it nearsightedness, obesity, mental focus or a physical handicap. Athletes such as baseball's Jim Abbott[5] or football's Tom Dempsey[6] set standards in spite of their handicaps, not because of them. When Dempsey set a National Football League record 63 yard field goal, no asterisk was put in the record books that said the player was allowed extra consideration because of his handicap which makes this a questionable record. Baseball players that "fanned" on a Jim Abbott fastball cannot say the strikeout was due to modified standards to accommodate Abbott's arm. Kenny asserts that the whole complexion of the professional game of golf changes if one competitor does not have to walk the course. It does a disservice to all professional golf players to fundamentally alter the nature of the competition by giving any one person any competitive advantage. Respondent is too good of a golfer to have an asterisk after any victory he wins. If one questions that riding in a golf cart will not be perceived as an unfair advantage, simply ask the person with the highest score that did not "make the tournament cut" when Petitioner did make the cut while riding in a golf cart.

Kenneth R. Green, II believes that either all professional golfers should walk the course or all professional golfers should be allowed to ride in golf carts if the Petitioner voluntarily changes its rules. Until such time, Respondent should be content with the

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[5] A Major League Baseball all-star pitcher who is missing one arm from the elbow down. *Who's Who In America*, 51st ed. "Jim Abbott", 3 (Marquis, 1997).

[6] A record setting field goal kicker for the New Orleans Saints who only had one-half of his kicking foot and a withered right hand. *The Complete Book of Football*, 149-150 (Arno Press, 1980).

honor, and large paychecks, associated with being PGA Tour professional. The only "handicap" Kenny wants associated with his golf game is the one assigned by the U.S. Golf Association to all golfers who play regularly. The judgment of the Ninth Circuit should be reversed. A golf cart in a PGA Tour event for one golfer would fundamentally, and dramatically, give that golfer an unfair competitive advantage. Every golfer must overcome some disability to master the game. For some it is a "hook" or "slice" swing. For some it is putting. Others, like Kenny and Respondent, find fatigue or concentration the "thorn in the flesh".[7] All competitors, even Tiger Woods, will eventually be overtaken by the disabilities associated with aging.[8] Irregardless, the holes and sand traps are the same distance from the tee for all competitors. The rest of the rule of the game should also apply uniformly to all competitors; no matter what their "handicap".[9]

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[7] *See*, ***The Holy Bible***, (NIV), II Corinthians 12:7-9 (Zondervan, 1981). While the Bible does not specify what St. Paul's physical ailment was, it is clear he overcame his disability without complaint or special consideration.

[8] Could Mr. Justice White have realistically returned to his previous career in the National Football League on the day Mr. Justice White retired from this Honorable Court?

[9] Clarksville, Tennessee has produced several other top-notch athletes that overcame physical disabilities to reach national prominence. Wilma Rudolph, who won three gold medals at the 1960 Olympics, overcame polio without asking for special rule modifications. Sugar, *The 100 Greatest Athletes of All Time*, "Wilma Rudolph", 289 (Citidal Press, 1995). Professional Golfer Mason Rudolph had vision problems, Rudolph, *The Rudolph Family of Tennessee*, 2d "Mason Rudolph", 206 (1997), and Bonnie Sloan was the first deaf player in the National Football League. *See*, www.Deaf Professional Football/Bonnie Sloan.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit, in *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000) should be reversed.

Respectfully Submitted,

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